

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of

Implementation of the Pay Telephone
Reclassification and Compensation
Provisions of the Telecommunications
Act of 1996

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CC Docket No. 96-128

REPLY COMMENTS OF
THE AMERICAN PUBLIC COMMUNICATIONS COUNCIL

Albert H. Kramer
Robert F. Aldrich

2101 L Street, N.W.
Washington, D.C. 20037-1526
(202) 828-2226

Attorneys for the American Public
Communications Council

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initial phase of per-call implementation to the Interim Period would replicate the grossly inaccurate call counts of 1998 onto the Interim Period, and compound the inequities and disputes that plagued the first year of per-call compensation.

As AT&T points out:

[T]he ability to apply the Coalition's proposal assumes that the per-call compensation payments in 1998 were based upon actual payphone usage. Unfortunately, that is not the case for a significant number of payphones.

As the Commission is aware, there was much concern in 1997-98 about LECs' ability to pass, and IXC's ability to process, the Flex ANI codes needed to track and process payphone traffic for compensation purposes. Accordingly, the Commission issued a number of waivers to LECs that allowed them to extend the time to make such codes available to IXCs. In addition, the Commission granted waivers to IXCs that allowed them to use surrogates to estimate the amount of payphone traffic for which compensation was due. Thus, carriers' ability to track payphone calls using Flex ANI remained an issue for a major portion of 1998, and generated ongoing differences between carriers and PSPs (particularly those operating "smart" payphones) regarding compensation payments. As a result, application of the Coalition's initial proposal is more likely to lead to disputes than its alternative proposal [to allocate 131 calls per month based on each carrier's share of the toll-free market].

AT&T at 2. Worldcom adds that the Coalition proposal:

involves inaccuracies introduced into per call compensation by the incomplete implementation of Flex ANI by LECs during the first per call period. During this period of time, WorldCom compensated for calls identified with non-specific payphone coding digits, calls which may or may not have actually been payphone calls. Basing compensation for the interim period on compensation for calls associated with non-specific coding digits introduces another source of inaccuracy into the Coalition's proxy method.

Worldcom at 11-12.

Excel, IDT, Network Plus, Starpower, and RCN ("Excel *et al.*") also concur that the Flex ANI problems destroy any value of the 1998 compensation results as a proxy for Interim Period compensation:

Tracking the number of completed payphone calls during the 1998 Period was arduous, if not unrealistic, due in part to the failure of the LECs to timely implement payphone coding digits. Without FLEX ANI to differentiate between a payphone call and a restricted line call, the exact number of calls requiring compensation was often open for dispute. LEC petitions for waivers for additional time to implement such technology further demonstrates that the industry was not equipped to properly track payphone calls during the 1998 Period, which makes the 1998 Period a poor candidate for any measure of compensation owed during the Interim Period.

Excel *et al.* at 15, n.23.

While APCC has a different perspective on some aspects of the Flex ANI problem, the fact that neither IXC's nor the affected PSPs consider the 1998 compensation results to be accurate as applied to independent PSPs' smart payphones confirms that it would be arbitrary and capricious for the Commission to adopt the RBOCs' proposal as the basis for retroactive adjustment of independent PSPs' Interim Period compensation.

Even apart from the FLEX ANI problem, there are additional sources of glaring inaccuracies in the 1998 call counts. As Worldcom acknowledges, the initial per-call compensation period also witnessed massive problems with identification of the resellers allegedly responsible for payment of a huge portion of payphone calls. Worldcom at 10-11.¹

These major problems with the implementation of per-call compensation not only render the call counts unreliable, but they also ensure that any attempt to use the 1998 call counts as a basis for adjusting Interim Period compensation will succeed only in tying up Interim Period compensation, as well as 1998 compensation, in protracted disputes. Apart from the obvious unfairness of using disputed call counts from one period as a proxy for another period, there is the huge administrative burden of untangling disputes over

¹ Some IXCs also point out that carriers' operations often change dramatically from year to year. Worldcom at 11; Excel *et al.* at 13-14.

payphones that frequently have changed ownership between the two periods. Worldcom at 10-11. In other instances, the disputes have been settled but the resulting compromise payments cannot be claimed as accurate representation of call counts. Excel *et al.* at 15.

Such disputes and inaccuracies would compound an administrative burden that is unreasonable in any event under the RBOC proposal. As Worldcom explains, it will be necessary to match carrier payments for every payphone to the appropriate PSP for each of the two periods, and then develop protocols to deal with situations where ANIs, PSP and carrier identifications do not match (including where carriers entered or exited the business, and where area code splits change the payphone ANI). Administering payment adjustments under this proposal is extremely burdensome, especially for the hundreds of PSPs making up the independent PSP industry, which has experienced an unusual degree of economic stress and associated changes in payphone ownership.

II. IF A TRUE-UP IS CONDUCTED, INTERIM PERIOD COMPENSATION MUST BE COMPUTED BASED ON THE UPDATED CALL COUNTS PROVIDED IN THE RECORD

Some of the IXC's that oppose the RBOC proposal support a true-up based on an allocation of an estimated average per payphone call volume.² AT&T and Worldcom take the position that the Commission should utilize the estimate of 131 calls that the Commission arrived at based on record data submitted in the original payphone compensation proceeding. These IXC's disregard, however, that the record estimates for independent PSPs' payphones were updated subsequently with more comprehensive call

² The IXC's do not agree on what proxy the allocation should be based on. AT&T favors an allocation based on carriers' relative shares of the toll-free 800 market, while Worldcom proposes an allocation based on a modified version of the FCC's initial interim allocation based on shares of annual toll revenue.

data for 1997, the year that most closely corresponds to the Interim Period. As shown in Attachments 3 and 4 to APCC's initial comments on the RBOC Proposal, the most comprehensive survey of independent PSPs' call volumes, placed in the record in March 1998, showed that independent PSPs averaged 159 calls per payphone per month.

This survey is based on a reasonable nationwide sample of diverse payphones and PSPs operating in diverse types of locations and geographical areas, and is more reliable than the estimates previously made by the Commission, because the period covered by this survey is closest in time to the actual Interim Period. Further, the results of the survey are consistent with the Commission's findings that during this time frame independent PSPs' payphones served higher-volume locations than ILEC payphones. *Third Report and Order, and Order on Reconsideration of the Second Report and Order*, 14 FCC Rcd 2545, ¶ 158 n.329 (noting that independent payphones "have been free to target higher traffic areas, where a payphone could be profitable relying solely on coinless revenues"). *See also Id.*, ¶ 144 (comparing average total call volumes for RBOC and independent PSP payphones).

III. THE COMMISSION SHOULD DECIDE AGAINST CONDUCTING TRUE-UPS FOR THE SECOND REPORT AND ORDER AND INTERIM PERIOD FOR INDEPENDENT PAYPHONES

As explained in APCC's initial comments, it is premature for the Commission to decide the details of an Interim Period true-up until the Commission has completed all necessary determinations to resolve the threshold issue of whether the retroactive adjustments contemplated for the Interim Period *and* the Second R&O Period (October 7, 1997 to April 21, 1999) are justified by the equities. As noted in APCC's comments, the Commission has not yet made the necessary equitable determinations regarding the need for such adjustments.

With respect to the Second R&O Period, as also discussed in APCC's comments, the Colorado Payphone Association demonstrated in its petition for reconsideration of the *Third Report and Order*, that the equities do *not* justify requiring independent PSPs to refund the difference between the \$.284 rate in effect during that period and the current \$.24 (or \$.238) rate. There is no valid reason for requiring independent PSPs to return that legally collected compensation to the IXC's. First, IXC's have already recovered their compensation payments from subscribers and would gain an undeserved windfall from such refunds. Second, PSPs were improperly denied compensation for the bulk of their calls for four years prior to the Interim Period. Therefore, it would be arbitrary and capricious for the Commission to require refunds of compensation collected by independent PSPs during the Second R&O Period.

If, despite the lack of supporting equities, the Commission does require refunds of the "excess" compensation paid in the Second R&O Period, then the Commission *must* also allow independent PSPs to collect the balance of the compensation to which they are equitably entitled for the Interim Period. To require refunds for one prior period while denying offsetting net payments for another prior period would be the height of unjust and arbitrary decisionmaking.

However, the comments filed well illustrate the difficulties faced by the Commission in crafting a workable and equitable adjustment for the Interim Period. There is no consensus among the parties as to either the total call volume to be attributed, or the appropriate allocation of that total among carriers. While the Commission clearly may not use the RBOC proposal as the basis for adjusting independent PSPs' compensation, none of the other allocation alternatives proposed by the parties is free from plausible objections. Further, each of the available alternatives affects individual PSPs and carriers differently,

creating “winners” and “losers” in a more or less arbitrary fashion. Finally, any of the alternatives will pose major implementation problems.

Considering all these factors, the most reasonable way for the Commission to resolve the retroactive adjustment issue with respect to independent PSPs is to maintain the status quo by declining to require true-ups for *either* the Interim Period *or* the *Second R&O Period*. By adopting this resolution, the Commission will avoid the major legal uncertainties and administrative burdens that inevitably would attend any of the available true-up options.³

IV. OTHER ASPECTS OF A TRUE-UP

APCC opposes Sprint’s proposal that the true-ups for the Interim Period and the Second R&O Period should happen simultaneously in a single transaction, if Sprint’s intention is to require a single lump sum payment to or from each PSP. To the extent that PSPs are required to refund money, they should be permitted to do so over a reasonable period of time. In addition, carriers with positive and negative net payments should be required to settle among themselves before payments are made to or exacted from PSPs. Otherwise, PSPs will find themselves in the position of middlemen paying out compensation to one carrier and collecting from another. For example, if Carrier A owes a “net” payment of \$10.00 per payphone more than its previous Interim Period payment,

³ APCC recognizes that the ILECs are in a different position from independent PSPs with respect to Interim Period compensation, because ILECs were not eligible for Interim Period compensation during the initial portion of that period. Therefore, it may be reasonable for the Commission to make a separate determination as to retroactive adjustment of ILEC compensation. To the extent that the Commission deems it necessary to make a uniform determination on retroactive adjustments with respect to all payphones, then the equities affecting the ILECs must be factored in, including, *e.g.*, the ILECs failure to timely deploy the call tracking technology required by the *Payphone Order* for the smart payphones used by independent PSPs.

and Carrier B is entitled to a refund of \$5.00 per payphone from its 1996 payment, it is more efficient and equitable for the Carrier B to collect the \$5.00 from Carrier A, rather than to collect it from a PSP who must then assume the burden and risk of recovering the money from Carrier A. Requiring payments to be made to and from the PSPs in each instance unnecessarily increases the administrative burden on PSPs, while placing them in the middle of potential disputes that should be settled among the carriers themselves.

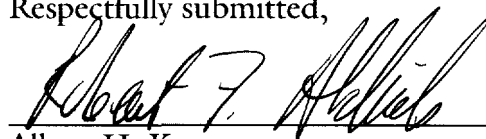
APCC also opposes Sprint's proposed requirement that true-ups be completed within 90 days after release of the FCC's order. Given the administrative issues and the potential for disputes, that is an unreasonably short time frame to expect a true-up and is likely to generate additional mistakes and disputes resulting from undue haste.

CONCLUSION

The FCC should not adopt the RBOCs' proposal. If true-ups are ordered for the Interim Period and the Second R&O Period, then Interim Period compensation for independent PSPs should be based on the record estimate of 159 calls per payphone per month for the year 1997. However, the best course is to decide against true-ups for these periods.

Dated: October 31, 2000

Respectfully submitted,



Albert H. Kramer
Robert F. Aldrich

2101 L Street, N.W.
Washington, D.C. 20037-1526
(202) 828-2226

Attorneys for the American Public
Communications Council

CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2000, I caused a copy of the foregoing Reply Comments of the American Public Communications Council to be sent by U.S. mail, first class, postage pre-paid to the following:

Dorothy Attwood
Chief, Common Carrier Bureau
Federal Communications Commission
445 12th St., SW, Room 5-C345
Washington, D.C. 20554

Mary Beth Richards
Acting Deputy Bureau Chief
Common Carrier Bureau
Federal Communications Commission
445 12th St., SW, Room 5-C345
Washington, D.C. 20554

Jane Jackson
Chief, Competitive Pricing Division
Common Carrier Bureau
Federal Communications Commission
445 12th St., SW, Room 5-A225
Washington, D.C. 20554

Lenworth Smith, Jr.
Chief, Legal Branch
Common Carrier Bureau
Federal Communications Commission
445 12th St., SW, Room 5-A461
Washington, D.C. 20554

Lynne Milne
Chief, Tariff & Pricing Analysis Branch
Common Carrier Bureau
Federal Communications Commission
445 12th St., SW, Room 5-A365
Washington, D.C. 20554

Jon Stover
Common Carrier Bureau
Federal Communications Commission
445 12th St., SW, Room 5-A341
Washington, D.C. 20554

Michael K. Kellogg
Aaron M. Panner
Kellogg, Huber, Hansen, Todd
& Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, DC 20005

ITS
1231 20th Street, N.W.
Washington, DC 20037

Mark C. Rosenblum
Richard H. Rubin
Room 1127M1
295 N. Maple Avenue
Basking Ridge, NJ 07920

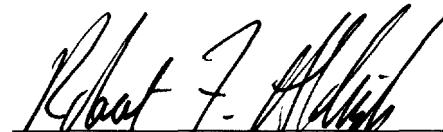
Steven A. Augustino
Darius B. Withers
Kelley Drye & Warren LLP
1200 19th Street, N.W.
Suite 500
Washington, DC 20036

Leon M. Kestenbaum
Jay Keithley
Richard Juhnke
Sprint Corporation
401 19th Street, N.W., Suite 400
Washington, DC 20004

Ky E. Kirby
Kathleen L. Greenan
Gregg Strumberger
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W., Suite 300
Washington, DC 20007

Larry Fenster
WorldCom
1801 Pennsylvania Avenue, N.W.
Washington, Dc 20006

Cheryl A. Tritt
Frank W. Krogh
Morrison & Foerster LLP
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20007


Robert F. Aldrich